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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re: ) Bankruptcy Case  
) No. 02-31453-DM  
) Chapter 11  
DIVA SYSTEMS CORPORATION, )  
a Delaware corporation )  
Debtor. )

\_\_\_\_\_)  
DIVA SYSTEMS CORPORATION, ) Adv. Proc. No. 02-3272-TC  
)  
Plaintiff, )  
)  
vs. )

GEMSTAR-TV GUIDE INTERNATIONAL, )  
INC., VOD TECHNOLOGY HOLDINGS, )  
INC., HENRY C. YUEN, )  
ELSIE LEUNG, JEFF SHELL, and )  
JONATHAN B. ORLICK, )  
Defendants. )

\_\_\_\_\_)  
GEMSTAR-TV GUIDE INTERNATIONAL, ) MEMORANDUM RE PLAINTIFF'S MOTION  
INC. and VOD TECHNOLOGY ) FOR PARTIAL SUMMARY JUDGMENT  
HOLDINGS, INC., )

Counter-Claimants, )  
vs. )

DIVA SYSTEMS CORPORATION and )  
SCIENTIFIC-ATLANTA, INC., )  
Counter-Defendants. )

\_\_\_\_\_)  
MEMORANDUM RE PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

1       Gemstar backed out of a contract to purchase DIVA's assets,  
2 when one of Gemstar's competitors filed an action against Gemstar  
3 alleging that the acquisition would violate antitrust laws. DIVA  
4 sued for breach of contract. I grant DIVA's motion for partial  
5 summary judgment, determining that under the terms of the parties'  
6 contract, the antitrust action did not excuse Gemstar from  
7 completing the purchase.

8       **BACKGROUND**

9       Gemstar and DIVA are both engaged in the development of  
10 audio-visual technology. Gemstar, which holds more than 200 U.S.  
11 patents, contracted to purchase substantially all the assets of  
12 DIVA, which itself holds a large portfolio of patents and other  
13 intellectual property rights. The purchase price was to be  
14 approximately \$40 million in cash and Gemstar stock. The terms  
15 were set forth in an integrated contract known between the parties  
16 as the Asset Purchase Agreement (the APA). Gemstar insisted that  
17 DIVA file a bankruptcy petition and that the APA be effected  
18 through a chapter 11 plan.

19       Before the plan was confirmed and the transaction closed,  
20 Scientific-Atlanta, Inc. filed an action in the bankruptcy court  
21 alleging that Gemstar's proposed purchase of DIVA's assets would  
22 further Gemstar's ongoing violation of antitrust laws (the  
23 Antitrust Action). The complaint alleges that Gemstar has  
24 attempted to restrain competition by aggressive acquisition of  
25 patents and by filing unfounded patent infringement suits against  
26 its competitors. The complaint alleges that Gemstar's proposed  
27 acquisition of DIVA's patents is part of this illegal scheme and  
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1 violates the Clayton Act by substantially lessening competition.  
2 The complaint notes that Gemstar's alleged patent abuse is the  
3 subject of another action pending before the district court in  
4 Georgia (the MDL Proceeding),<sup>1</sup> and asks that the Antitrust Action  
5 be withdrawn from the bankruptcy court and made a part of the MDL  
6 Proceeding.

7 The prayer for relief in the Antitrust Action seeks: (1) a  
8 determination that Gemstar has violated the Clayton Act; (2) an  
9 injunction against "any enforcement or exclusive utilization of  
10 DIVA's assets" pending the outcome of the MDL Proceeding; and  
11 (3) damages according to proof. In a status conference statement  
12 filed in the Antitrust Action, Scientific-Atlanta states that it  
13 "does not seek to prevent confirmation of the [chapter 11] plan or  
14 to prevent Gemstar's acquisition of DIVA's assets," and "S-A would  
15 oppose the plan and the acquisition only to the extent that  
16 confirmation of the plan would purport to impair S-A's ability to  
17 pursue its rights against Gemstar in the Adversary Proceeding  
18 and/or the MDL Proceeding."

19 The bankruptcy court dismissed the Antitrust Action without  
20 prejudice for lack of subject-matter jurisdiction. The court  
21 concluded that because the action did not seek to block  
22 confirmation of the chapter 11 plan or closing of the APA, the  
23 action did not affect DIVA's bankruptcy estate and should therefore  
24 be filed in the district court.

25 Gemstar terminated the APA on the basis that the Antitrust  
26 Action constituted a breach of DIVA's warranty that there were no  
27 actions "that directly or indirectly challenge the validity of this  
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1 Agreement or any action taken or to be taken pursuant hereto."<sup>2</sup>

2 DIVA then filed the present action alleging that Gemstar breached  
3 APA and that DIVA is entitled to recover the agreed-upon purchase  
4 price and other damages.

5 DIVA now brings a motion for partial summary judgment, seeking  
6 a determination that Gemstar was not entitled to terminate the APA  
7 on the basis of the Antitrust Action. In support of this motion,  
8 DIVA relies solely upon the language of the APA, the complaint in  
9 the Antitrust Action, the status conference statement filed by  
10 Scientific-Atlanta, and Gemstar's notice of termination. DIVA  
11 contends that the Antitrust Action does not cause a breach of  
12 DIVA's litigation warranty because the action was filed against  
13 Gemstar (not against DIVA), and because the action does not allege  
14 that DIVA cannot or should not be permitted to deliver good title  
15 to Gemstar. DIVA also contends that even if the Antitrust Action  
16 did cause a breach of its warranty, it also caused a breach of  
17 Gemstar's identical litigation warranty, and that in such  
18 circumstances the APA does not permit Gemstar to terminate the APA.  
19 In opposing the motion for partial summary judgment, Gemstar  
20 contends that the Antitrust Action did constitute a breach of  
21 DIVA's warranty, and did not cause a breach of its own litigation  
22 warranty.

23 Before discussing the merits of the parties' arguments, it is  
24 appropriate to review the terms of the APA in more detail.

#### 25 **THE ASSET PURCHASE AGREEMENT**

26 The provisions of the APA relevant to this controversy are  
27 found in four different parts of the contract: DIVA's warranties;  
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1 Gemstar's warranties; conditions to closing; and termination  
2 provisions.

3 Article IV sets forth DIVA's warranties. The twenty sections  
4 of this article address DIVA's corporate organization and standing,  
5 its ownership of the property to be transferred, its corporate  
6 authority to effect the transfer, its compliance with various law  
7 and regulations, and environmental hazards. Section 4.9 provides:

8 ***There are no actions or proceedings pending or, to***  
9 ***the knowledge of DIVA, threatened, that directly or***  
10 ***indirectly challenge the validity of this Agreement or***  
11 ***any action taken or to be taken pursuant hereto.*** Except  
12 as set forth in Section 4.9 of the DIVA Disclosure  
13 Schedule, there is no material action, proceeding or  
investigation pending or, to DIVA's knowledge, currently  
threatened against or affecting DIVA before any court or  
administrative agency. There is no action, proceeding or  
investigation by DIVA currently pending or that DIVA  
intends to initiate.

14 (Emphasis added). Gemstar contends the Antitrust Action comes  
15 within the emphasized language in section 4.9.

16 Article III sets forth Gemstar's warranties. Its provisions  
17 address Gemstar's capitalization and corporate structure, its  
18 authority to effect the transaction, and its compliance with  
19 various laws and regulations. Section 3.6 provides:

20 Except as set forth in Section 3.6 of the Gemstar  
21 Disclosure Schedule or as described in the Gemstar 10-Q,  
22 to Gemstar's knowledge, there is no action, proceeding  
23 or investigation pending or currently threatened against  
24 or affecting Gemstar before any court or administrative  
25 agency which could reasonably be expected to have a  
26 Material Adverse Effect on Gemstar. To Gemstar's  
27 knowledge, Gemstar is not in default with respect to  
28 any order, writ, injunction, decree, ruling or decision  
of any court, commission, board or other Governmental  
Agency. ***To Gemstar's knowledge, there are no actions or***  
***proceedings pending or threatened that directly or***  
***indirectly challenge the validity of this Agreement, the***  
***sale of the Gemstar shares pursuant hereto or any action***  
***taken or to be taken pursuant hereto.***

1 (Emphasis added). DIVA contends that if the Antitrust Action comes  
2 within the emphasized language in its litigation warranty, it also  
3 comes within the emphasized language in Gemstar's litigation  
4 warranty.

5 Article VI addresses conditions to closing. Section 6.1  
6 provides that neither party is required to close the transaction  
7 in the face of the following bargain-threatening litigation.

8 (b) No Injunctions. There shall not be in effect  
9 any statute, regulation, order, decree or judgment of any  
10 governmental authority that makes it illegal or enjoins  
or prevents the consummation of the transactions  
contemplated by this Agreement.

11 . . .

12 (d) Bankruptcy Court. No action, suit, or proceed-  
13 ing (including any proceeding over which the Bankruptcy  
Court has jurisdiction under 28 U.S.C. § 157(b) and (c))  
14 shall be pending in the Bankruptcy Court (i) to enjoin,  
restrain, prohibit, or obtain substantial damages or  
15 significant equitable relief in respect of or related  
to the transactions contemplated by this Agreement, or  
16 (ii) that would be reasonably likely to prevent or make  
illegal the consummation of the transactions contemplated  
17 by this Agreement.

18 It is undisputed that the Antitrust Action does not come  
19 within subsection (b) because it was not brought by a governmental  
20 agency. It is undisputed that the Antitrust Action also does not  
21 come within subsection (d), because it was dismissed before the  
22 closing date and before Gemstar terminated the APA.

23 Section 6.2(a) provides that Gemstar may decline to close if  
24 any of DIVA's warranties are untrue as of the date the APA was  
25 signed or on the closing date.

26 Section 6.3(a) provides, subject to certain exceptions, that  
27 DIVA may decline to close if any of Gemstar's warranties are untrue  
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1 as of the date the APA was signed or on the closing date. One of  
2 the exceptions provides that DIVA may not decline to close based on  
3 Gemstar's breach of its litigation warranty if the litigation is  
4 disclosed two days prior to the pricing period.<sup>3</sup> It is this  
5 exception that Gemstar relies upon in contending that the filing of  
6 the Antitrust Action violated DIVA's litigation warranty without  
7 causing a violation of Gemstar's litigation warranty.

8 Article VII addresses termination of the APA. Section 7.1(a)  
9 (ii) and (iv) provide that either party may terminate upon the  
10 basis of the following bargain-threatening litigation.

11 (ii) Purchaser or DIVA may terminate this  
12 Agreement by written notice if: . . . (ii) there shall be  
13 a Final Order, or a final nonappealable order of a court  
14 of competent jurisdiction, in effect preventing  
15 consummation of the Acquisition or (iii) there shall be  
16 any statute, rule, regulation or order enacted,  
17 promulgated or issued or deemed applicable to the  
18 transactions contemplated hereby by any Governmental  
19 Agency that would make consummation of the Acquisition  
20 illegal;

21  
22 . . .

23  
24 (iv) Purchaser may terminate this Agreement by  
25 written notice if there shall be any action taken, or any  
26 statute, rule, regulation or order enacted, promulgated  
27 or issued or deemed applicable to the Acquisition by any  
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1 Governmental Agency, which would (i) prohibit Purchaser's  
2 ownership of all or a substantial portion of the  
3 Transferred Assets (other than the Non-Transferred  
4 Contracts) or (ii) compel Purchaser to dispose of or hold  
5 separate all or a substantial portion of the Transferred  
6 Assets (other than the Non-Transferred Contracts) or the  
7 assets of Purchaser as a result of the Acquisition;

8 It is undisputed that the Antitrust Action does not come within  
9 either of these provisions.

10 Paragraph (v) of section 7.1(a) provides that Gemstar may  
11 terminate the APA upon a material of breach of warranty by DIVA.

12 (v) Purchaser may terminate this Agreement by  
13 written notice if neither it nor Gemstar is in material  
14 breach of its obligations under this Agreement and there  
15 has been a material breach of any representation,  
16 warranty, covenant or agreement contained in this  
17 Agreement on the part of DIVA which breach would result  
18 in the conditions set forth in Section 6.2(a) not being  
19 satisfied, and such breach has not been cured prior to  
20 the later of (a) the date set forth in Section 7.1(a)(ii)  
21 or (b) the date twenty (20) business days after written  
22 notice to DIVA; *provided, however, that, no cure period*  
23 *shall be required for a breach which by its nature cannot*  
24 *be cured;*

25 (*Italics in original*). It is this provision upon which Gemstar  
26 relied in terminating the APA. Gemstar contends that the Antitrust  
27 Action constitutes a breach of DIVA's warranty regarding litigation  
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1 set forth in section 4.9, and that such a breach excuses Gemstar  
2 from closing under section 6.2(a). As noted above, DIVA contends  
3 that Gemstar may not invoke section 7.1(a), because it is not  
4 possible to treat the Antitrust Action as causing DIVA to be in  
5 breach of section 4.9, without the action also causing Gemstar to  
6 be in breach of section 3.6.

## 7 **ANALYSIS**

### 8 **A. CONTRACT INTERPRETATION AND SUMMARY JUDGMENT**

9 California law governs the APA. (APA § 8.4). Under California  
10 law, a contract must be interpreted to give effect to the mutual  
11 intention of the parties as it existed at the time the contract was  
12 entered. Gerwer v. Salzman (In re Gerwer), 253 B.R. 66, 73 (9th  
13 Cir. B.A.P. 2000). Where a contract has been reduced to writing,  
14 the parties' intentions are to be determined from the writing  
15 alone, if possible. Id. A court may resolve a breach-of-contract  
16 action via summary judgment, determining the intent of the parties  
17 from the language of the written contract alone, where neither  
18 party offers admissible extrinsic evidence regarding the meaning of  
19 the written contract. U.S. Cellular Investment Co. of Los Angeles,  
20 Inc. v. GTE Mobilnet, Inc., 281 F.3d 929, 937 (9th Cir. 2002). The  
21 court need not consider extrinsic evidence regarding the meaning of  
22 an integrated written agreement, where such evidence is offered to  
23 prove an interpretation to which the language of the written  
24 agreement is not reasonably susceptible. Id. at 938-39.

### 25 **B. PLAIN MEANING OF THE CONTRACT**

26 Reading the APA as a whole, and affording its words their most  
27 natural and sensible interpretation, I determine that the filing of  
28

1 the Antitrust Action did not cause DIVA to breach the litigation  
2 warranty set forth in section 4.9 of the APA. The problem for  
3 Gemstar is not the bankruptcy court's dismissal of the Antitrust  
4 Action. Scientific-Atlanta still "threatens" to assert the same  
5 claims against Gemstar in the Georgia MDL Action. The problem is  
6 that the Antitrust Action is not one which can be reasonably  
7 construed to come within DIVA's litigation warranty. In making  
8 this determination, I rely upon the following considerations.

9 First, the Antitrust Action does not fall within the literal  
10 language of the warranty, which is limited to litigation  
11 challenging "the validity of this Agreement or any action to be  
12 taken pursuant thereto." The Antitrust Action alleges that Gemstar  
13 has attempted to restrain competition by acquiring patents and by  
14 filing unfounded patent infringement actions against its  
15 competitors. The action alleges that Gemstar's proposed  
16 acquisition of DIVA's patents is in furtherance of this illegal  
17 scheme of restraining competition. The prayer seeks not to prevent  
18 Gemstar's acquisition of DIVA's patents, but to restrain Gemstar's  
19 exclusive use of those patents and enforcement of those patents  
20 against Gemstar's competitors. Plaintiff Scientific-Atlanta  
21 stated expressly in a status conference statement that it was not  
22 seeking to block the closing of the APA. It is worthy of note that  
23 the APA provides for the transfer of assets from DIVA to Gemstar,  
24 but does not specify how Gemstar is to use those assets. Thus,  
25 while the Antitrust Action may threaten to frustrate the general  
26 purpose for which Gemstar entered into the APA, the action does not

1 directly or indirectly challenge the APA itself or any acts to be  
2 taken pursuant to that agreement.

3       Second, section 4.9 is a seller's warranty, and the Antitrust  
4 Action is not related to the customary purposes of a seller's  
5 warranty. A seller's warranty is typically intended to ensure that  
6 the purchaser will receive from the seller what the purchaser  
7 expects to receive. "A warranty relates to the title, character,  
8 quality, or condition of the goods. The purpose of the law of  
9 warranty is to determine what it is that the seller has in essence  
10 agreed to sell." Keith v. Buchanan,, 173 Cal. App. 3d 13, 20  
11 (1985) (citing A.A. Baxter Corp. v. Colt Industries, Inc.,  
12 10 Cal. App. 3d 144, 153 (1970)). DIVA's other warranties under  
13 Article IV of the APA are of this type. They relate to DIVA's  
14 standing, title to the assets to be transferred, authority to make  
15 and perform the APA, and so forth. Taken as a part of DIVA's  
16 warranties, the most natural reading of section 4.9 is that it  
17 refers to actions that challenge DIVA's ability to give good title  
18 to Gemstar. In contrast, it requires a very strained reading to  
19 find that the filing of the Antitrust Action caused a breach of  
20 DIVA's warranty, because the action does not challenge DIVA's  
21 ability to convey good title, does not attempt to enjoin the  
22 transfer, and does not allege any wrongful conduct by DIVA.

23       Third, construing section 4.9 to cover the Antitrust Action  
24 would result in DIVA breaching the APA, and possibly being liable  
25 to Gemstar, solely as a result of alleged wrongdoing by Gemstar.  
26 Once again, it is significant that section 4.9 represents a  
27 warranty by DIVA. Breach of that warranty is a breach of contract  
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1 by DIVA that gives rise to a claim for damages.<sup>4</sup> Section 7.1(b) of  
2 the APA expressly provides that if Gemstar terminates the agreement  
3 under section 7.1(a), DIVA remains liable for any breaches prior to  
4 such termination. The Antitrust Action, however, is based solely  
5 on alleged wrongdoing by Gemstar. The most straightforward way to  
6 avoid the anomaly of DIVA being liable to Gemstar for alleged  
7 wrongdoing by Gemstar is to construe section 4.9 as a seller's  
8 warranty covering only those actions related to DIVA's ability to  
9 convey good title to Gemstar.

10 Fourth, provisions of the APA other than DIVA's litigation  
11 warranty address the problem of litigation that does not challenge  
12 DIVA's ability to convey good title, but that otherwise threatens  
13 to frustrate the benefits Gemstar expects to obtain. Sections  
14 6.1(a),(d) and 7.1(a)(ii),(iv) provide that the filing of certain  
15 types of such litigation excuses Gemstar from closing and permits  
16 Gemstar to terminate the APA. The existence of these provisions  
17 suggests that the parties decided to address the problem of  
18 benefit-threatening litigation through stand-alone provisions,  
19 rather than by stretching sellers' warranties beyond their usual  
20 scope and purpose. As noted above, the Antitrust Action does not  
21 fall within any of the types of litigation defined in section  
22 6.1(a),(d) or section 7.1(a)(ii),(iv).

### 23 **C. PAROLE EVIDENCE AND ADDITIONAL DISCOVERY**

24 Gemstar contends that the court should not give the language  
25 of the APA the ordinary meaning described above, because the  
26 parties have assigned the language a special meaning. Under  
27 California law, parole evidence may be introduced to show the  
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1 meaning of an integrated contract, even if that contract is not  
2 patently ambiguous, so long as the parole evidence is relevant to  
3 prove a meaning to which the language of the contract is reasonably  
4 susceptible. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage &  
5 Rigging Co., Inc., 442 P.2d 641, 644 (1968). Gemstar contends that  
6 discovery will show that the parties intended DIVA's litigation  
7 warranty to include the Antitrust Action. This court should deny  
8 summary judgment pursuant to Federal Rule of Civil Procedure 56(f),  
9 Gemstar contends, to enable Gemstar to conduct additional  
10 discovery.

11 This argument is unpersuasive, because the APA is not  
12 reasonably susceptible to the interpretation Gemstar seeks to  
13 impose on it. The problem is not simply that the language of  
14 DIVA's litigation warranty cannot be read to include the Antitrust  
15 Action. The problem is that such a reading would compel a  
16 determination that the Antitrust Action also caused a breach of  
17 Gemstar's litigation warranty. This is of critical importance,  
18 because paragraph 7.1(a)(v) of the APA states that Gemstar is not  
19 entitled to terminate the APA on the basis of DIVA's breach of  
20 warranty if Gemstar is also in breach.

21 The litigation warranties of DIVA and Gemstar are virtually  
22 identical. The DIVA warranty (section 4.9) states in relevant  
23 part:

24 There are no actions or proceedings pending or,  
25 to the knowledge of DIVA, threatened, that directly  
26 or indirectly challenge the validity of this Agreement  
or any action taken or to be taken pursuant hereto.

27 The Gemstar warranty (section 3.6) states in relevant part:

1 To Gemstar's knowledge, there are no actions or  
2 proceedings pending or threatened that directly or  
3 indirectly challenge the validity of this Agreement, the  
sale of the Gemstar Shares pursuant hereto or any action  
taken or to be taken pursuant hereto.

4 A finding that the Antitrust Action triggers the DIVA warranty  
5 but not the Gemstar warranty is not an interpretation to which the  
6 language of these warranty provisions is reasonably susceptible.  
7 The problem for Gemstar is not that an action breaching one  
8 warranty must always breach the other. The problem is rather that  
9 in light of the specific nature of the Antitrust Action, one cannot  
10 reasonably find that a particular action caused a breach of the  
11 DIVA warranty alone. The Antitrust Action alleges wrongdoing by  
12 Gemstar but not by DIVA, and does not challenge DIVA's ability to  
13 convey good title or otherwise seek to stop the closing of the APA.  
14 In short, to the extent the Action threatens the bargain, it does  
15 so on the basis of alleged wrongful conduct of Gemstar only. As a  
16 result, no finder of fact could reasonably find that the Antitrust  
17 Action constituted a breach of warranty by DIVA but not a breach of  
18 warranty by Gemstar.

19 Gemstar argues that this court should refuse to interpret the  
20 Antitrust Action as creating mutual breaches of warranty, because  
21 such an interpretation "turns Sections 3.6 and 4.9 into mutually  
22 negating nullities." I agree that the court should try to avoid a  
23 finding that the Antitrust Action causes mutual breaches by both  
24 parties. It does not follow, however, that the action should be  
25 construed as a breach of warranty by DIVA alone. It is far more  
26 consistent with the nature of the Antitrust Action and the purpose  
27 of warranties to construe the Action as a breach of neither party's  
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1 warranty, or as a breach of Gemstar's warranty alone. The Action  
2 does not relate to the usual purpose of a seller's warranty,  
3 because it does not challenge DIVA's ability to convey title, or  
4 otherwise seek to block the closing of the APA. To the extent the  
5 Action seeks to prevent the parties from enjoying the full benefit  
6 of the contract, it does so on the basis of the alleged wrongful  
7 acts of Gemstar, not DIVA.

8       Gemstar next attempts to deal with the mutual breach problem  
9 by asserting that it is expressly excused from any breach of  
10 warranty resulting from the filing of the Antitrust Action.  
11 Gemstar relies upon section 6.3(a), which provides in relevant  
12 part: "Notwithstanding the foregoing, the representations and  
13 warranties contained in Section . . . 3.6 need not be true if the  
14 facts, events or circumstances relating to such untruth were  
15 publicly announced at least two trading days prior to the  
16 commencement of the Pricing Period." Gemstar argues that because  
17 the Antitrust Action was disclosed before the "pricing period,"  
18 Gemstar cannot be charged with any breach of warranty precluding it  
19 from terminating the APA pursuant to section 7.1(a)(v).

20       This argument is unpersuasive, because section 6.3(a)  
21 overrides Gemstar's litigation warranty only for the purpose of  
22 determining whether **DIVA** must close, not for the purpose of  
23 determining whether **Gemstar** may terminate the APA under section  
24 7.1(a)(v). Section 6.3(a) describes conditions subsequent that  
25 excuse DIVA from closing. It states that DIVA may not decline to  
26 close solely because Gemstar is in breach of its litigation

1 warranty. Section 6.3 does not state that the Gemstar litigation  
2 warranty is to be disregarded for any other purpose.

3 Thus, I determine that Gemstar should not be afforded time to  
4 obtain parole evidence that the parties intended the Antitrust  
5 Action to come within DIVA's litigation warranty, because any such  
6 evidence would not change the result.

7 **D. EQUITABLE CONSIDERATIONS**

8 On first examination, this court was persuaded by Gemstar's  
9 argument that it simply *must* be allowed to terminate the APA  
10 following the filing of the Antitrust Action, because that Action  
11 threatened to prevent Gemstar from using the purchased assets as  
12 intended. Upon closer examination, however, this argument does not  
13 hold up. It does not follow that any litigation that frustrates  
14 Gemstar's purpose in this matter automatically justifies  
15 termination of the contract, because termination itself frustrates  
16 DIVA's purpose. It is a zero-sum game. Thus, this court should  
17 not focus solely on the effect of the litigation on Gemstar, but  
18 should instead examine the contract provisions to see how the  
19 parties themselves decided to resolve their competing expectations.  
20 The APA addresses this problem directly by defining in considerable  
21 detail the types of litigation that do not involve DIVA's ability  
22 to convey good title, but that excuse Gemstar from completing the  
23 purchase because they otherwise frustrate Gemstar's expectations as  
24 buyer. See APA §§ 6.1(b),(d) and 7.1(a). Gemstar does not even  
25 argue that the Antitrust Action comes within these provisions.  
26 Instead, Gemstar asserts that it is entitled to terminate the APA  
27 on the basis that the Antitrust Action constitutes a breach of  
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1 seller DIVA's warranty. For the reasons noted above, the language  
2 of the APA simply cannot be read to reach this result. In light of  
3 the fact that the Antitrust Action does not come within the  
4 carefully defined protections provided Gemstar under sections 6.1  
5 and 7.1, and the insurmountable interpretive problems of allowing  
6 Gemstar to use the warranty provisions to terminate the APA, the  
7 only reasonable interpretation of the contract is that the parties  
8 placed DIVA's interest in obtaining the purchase price ahead of  
9 Gemstar's interest in avoiding the risks posed by the Antitrust  
10 Action.

11 **CONCLUSION**

12 DIVA is entitled to partial summary judgment determining that  
13 Gemstar did not properly terminate the APA on the basis of the  
14 Antitrust Action. Giving the language of the APA its ordinary  
15 meaning, the filing of the Antitrust Action did not violate seller  
16 DIVA's litigation warranty, because that Action did not challenge  
17 the validity of the contract or DIVA's ability to convey good  
18 title. Parole evidence is not admissible to show that the parties  
19 intended Gemstar to be able to terminate the APA on the basis of  
20 the Antitrust Action, because the APA is not reasonably susceptible  
21 to such a reading. The APA does not permit Gemstar to terminate  
22 the APA if Gemstar is in breach of its own litigation warranty,  
23 and the Antitrust Action cannot reasonably be found to cause a  
24 breach of DIVA's warranty without also triggering a breach of  
25 Gemstar's identical litigation warranty.

26 Dated: February 13, 2003

\_\_\_\_\_  
27 Thomas E. Carlson  
United States Bankruptcy Judge

1 1. In re Gemstar Development Corporation Patent Litigation, No.  
2 MDL 1274 WBH, United States District Court for the Northern  
District of Georgia.

3 2. Gemstar also asserted that it was entitled to terminate the  
4 APA on the basis that the bankruptcy court indicated it would not  
5 sign the precise form of sale order provided for in the APA. The  
present motion for partial summary judgment does not address this  
alternate basis for termination of the APA.

6 3. The bulk of the purchase price was to be paid in Gemstar stock,  
7 the number of shares to be determined by dividing the purchase  
8 price by the share price on the relevant date. Disclosure of the  
9 litigation would protect DIVA because any resulting decline in the  
value of Gemstar stock should be reflected in the market price  
before the number of shares DIVA was to receive was calculated.

10 4. That breach of this warranty is also a condition that excuses  
11 Gemstar's performance and does not negate the fact that it is also  
12 a breach of contract by DIVA. A contract may designate an act or  
13 event as both a breach of contract and a failure of condition,  
with the result that the act or event both excuses performance by  
the non-breaching party and permits that party to recover damages.  
1 B.E. Witkin, Summary of California Law, Contracts § 723 (9th ed.  
1987).